No. _____

Supreme Court, U.S.
FILED

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In The
Supreme Court of the United States

October Term, 1994

NANNY CAY ENTERPRISES, LTD., (PREVIOUSLY C.D. HUNTER ASSOCIATES), CARIBBEAN MARINE CENTER, LTD. and their subsidiary NANNY CAY, LTD., B.V.I. PROPERTY MANAGEMENT, NORBERT LORCK-SCHIERNING and KLAUS WAECHTER,

Petitioners,

v.

BARCLAYS BANK PLC,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 24, 1995

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QUESTIONS PRESENTED

(1) What deference should a plaintiff be entitled to before being required to litigate in a foreign country pursuant to the doctrine of *forum non conveniens* when significant decisions regarding the business transaction in question occurred at the defendant's headquarters in the United States?

(2) Did the Court abuse its discretion in dismissing litigation in the United States even though the Court did not find that litigation in the United States would be vexatious, harassing or even inconvenient to the defendant?

LIST OF PARTIES AND RULE 29.1 STATEMENT

Petitioners, Nanny Cay Enterprises, Ltd., (previously C.D. Hunter Associates), Caribbean Marine Center, Ltd. and their subsidiary Nanny Cay, Ltd., B.V.I. Property Management, Norbert Lorck-Schierning and Klaus Waechter were the plaintiffs in the United States District Court for the District of the Virgin Islands and the appellant in the United States Court of Appeals for the Third Circuit. Respondent Barclays Bank was the defendant in the District Court and the appellee in the Court of Appeals.

Pursuant to Rule 29.1 of the Rules of this Court, petitioners Nanny Cay Enterprises, Ltd., (previously C.D. Hunter Associates), Caribbean Marine Center, Ltd. and their subsidiary Nanny Cay, Ltd. and B.V.I. Property Management state that they are not publicly held corporations, nor do they have parent companies or subsidiaries other than wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners. Nanny Cay Enterprises, Ltd., (previously C.D. Hunter Associates), Caribbean Marine Center, Ltd. and their subsidiary Nanny Cay, Ltd., B.V.I. Property Management, Norbert Lorck-Schierning and Klaus Waechter respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-captioned proceeding.

OPINIONS BELOW

On March 2, 1992, the District Court summarily dismissed this action pursuant to the defendants' motion to dismiss pursuant to the doctrine of *forum non conveniens*. (Reprinted in the Appendix to this petition at p. 20a.) On March 24, 1993, the Third Circuit reversed this decision and remanded it to the District Court for further findings. *See* App. 3a.

On April 28, 1994, the District Court again dismissed this action due to the *forum non conveniens* issue. *See* App. 22a. The Court of Appeals affirmed the decision by judgment order without an opinion on December 16, 1994. *See* App. 1a. A petition for rehearing and rehearing *en banc* was filed with the Court which was denied by the Third Circuit on January 9, 1995. *See* App. 40a.

JURISDICTION

Invoking jurisdiction under 48 U.S.C. § 1612 and 4 V.I.C. § 32, the petitioners brought this suit in the United States District Court of the Virgin Islands. The Third Circuit invoked its jurisdiction under 28 U.S.C. §§ 1291 and 1294(3) and remanded this matter to the District Court. After the District Court again dismissed this claim, the Third Circuit again invoked its jurisdiction under 28 U.S.C. §§ 1291 and 1294(3) and affirmed the decision by judgment order on December 16, 1994. The Third Circuit then denied a timely petition for rehearing or rehearing *en banc* on January 9, 1995. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The petitioners brought a suit in St. Thomas, invoking the jurisdiction of the District Court of the Virgin Islands involving a loan transaction between the petitioners and Barclays Bank. The loan in question was obtained to construct a development on the island of Tortola which is located approximately 10 miles away in the British Virgin Islands. Although the loan was actually disbursed by the Barclays Bank branch in Tortola, all critical decisions related to the making of the loan were done at Barclays' regional office in New York. Subsequent to the initial loan being made, oversight authority for this transaction was shifted to St. Thomas where a regional office of the bank was established.

When subsequent problems developed with the loan, the regional office in St. Thomas orchestrated a restructuring of the loan which included taking additional security for the loan on St. Thomas. All decisions relative to the restructuring and resecuring of the loan were made in New York.

The District Court summarily dismissed this matter based upon the doctrine of *forum non conveniens*, finding that the loan involved Tortola real estate and as such, should have been filed in Tortola. Before dismissing the case, however, the District Court severed out the one Virgin Islands corporate defendant, D & C Development, Inc., which had joined in the claim against the bank related to the restructuring of the loan in St. Thomas. App. at 42a. In essence, the District Court's decision resulted in litigation taking place in two locations, one in St. Thomas involving St. Thomas collateral while all remaining issues were sent to Tortola. The Court also expressly stated that its dismissal was without prejudice if the plaintiffs refiled their complaint within a jurisdiction "other than the United States Virgin Islands" within 30 days from the date of its order. App. at 21a.

The Third Circuit reversed the decision of the District Court and remanded the case for further findings. App. at 3a. As noted by the Third Circuit in its initial opinion remanding this case:

> The loan at issue was distributed by Barclays' branch in Tortola. However, the loan required approval by Barclays' New York regional office. Subsequent to the original loan disbursement, Barclays reorganized and opened a regional office in St. Thomas with control over

the Tortola branch. The regional manager of this office reported directly to New York. When asked why the Tortola branch reports through the regional office to New York, the regional manager, Mr. White, responded, "[b]ecause of its affinity to the United States and the - for administrative reasons, the bank made that decision." App. at 169-170. Moreover, the Tortola branch and Barclays' U.S. Virgin Islands branches use the same procedures for administering loans. Mr. White also testified that it would take no more than one hour to travel between St. Thomas and Tortola and that when Barclays' employees from New York traveled to Tortola they would often pass through the U.S. Virgin islands. *See* App. at 182-184.

Apparently, when Barclays realized that it had extended CMC unauthorized overdraft credit, it sought additional collateral for its loan. Barclays and Waechter arranged for this collateral by having Barclays refinance the debts accrued by another corporation, D & C, which was controlled by Waechter and Schierning and was in the process of developing condominiums on St. Thomas. This refinanced loan was secured in part by the St. Thomas property; it provided for the transfer of $650,000 from the D & C loan to Barclays' Tortola branch to further secure the loan to CMC.

After the refinancing of the D & C loan, there was some joint administration of that loan and of the CMC loan. The record indicates that the regional manager in St. Thomas may have had ultimate responsibility for both loans, *see* App. at 215-16, and an internal memo from the

> St. Thomas regional office explained the "necessity of keeping both the D & C and the Nanny Cay in the same focus." App. at 232. Subsequently, the CMC/Nanny Cay loan was taken over by Mr. Jani in Barclays' New York office and the eventual default notice was sent from New York. *See* App. at 5a-6a.

In remanding the case, the Third Circuit specifically directed the District Court to look at the various factors relative to the *forum non conveniens* issue as enunciated by this Court in *Piper Aircraft Company v. Reyno*, 454 U.S. 235, 257 (1981). In this regard, the Third Circuit specifically directed the District Court to consider the deference being given to the plaintiffs' choice of forum.

On remand, subsequent developments were brought to the Court's attention. First, it was noted that Barclays had filed its own suit in the U.S. Virgin Islands against Mr. and Mrs. Waechter arising out of the claims brought against it regarding the St. Thomas collateral which resulted in the Waechters filing a counterclaim based upon issues related to the suit that had been previously dismissed for *forum non conveniens*. *See* App. at 44a. Thus, while Klaus Waechter was forced to litigate his claims against the Bank in Tortola, the bank found it convenient to sue him on their own third party action in the United States.[1] Second, it was pointed out to the Court that extensive discovery had taken place in the St. Thomas litigation, including the third party claim against Waechter who the bank had deposed, so that it certainly was not

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[1] The Waechters filed counterclaims regarding the same issues that were previously dismissed and are now again pending in the District Court.

inconvenient for the bank to litigate in St. Thomas in light of the discovery done in that case. Subsequent to the hearing on remand, the District Court again dismissed the case on the basis of *forum non conveniens*. While the District Court recognized the issue of the deference due the plaintiff's chosen forum, the District Court did not state what deference was due the plaintiffs' choice of forum in this case (App. at 27a), despite express instructions from the Third Circuit that it do so. App. at 18a.

The District Court did do an analysis of the various factors set forth in the *Piper* opinion. However, the District Court did not even discuss the fact that Waechter had now been sued in St. Thomas so that it was clearly convenient for the bank to litigate this transaction in the initial forum chosen by Waechter. The District Court did note, however, that there was a St. Thomas interest involved because of the initial case that it severed. In this regard, the District Court stated in its dismissal order as follows:

> Any St. Thomas interest and obligation will be aired and discharged totally in the separate litigation involving D & C's claims against plaintiffs and Barclays. If a St. Thomas court or jury finds that Waechter had no authorization to borrow against D & C property, and therefore as a matter of law he pledged no lawful consideration in Tortola, that may well preclude plaintiffs' claims in Tortola. Likewise, the D & C trial could determine, in effect, that good consideration was given for restructuring the Tortola loan. *See* App. at 37a.

As such, the District Court essentially held that the critical issue of consideration for the restructuring of the loan

would be resolved in St. Thomas even though it dismissed the remaining issues as being inconvenient for the bank to litigate in the U.S. Virgin Islands.[2]

An appeal was then taken to the Third Circuit which summarily affirmed the opinion of the District Court without an opinion. Because the original panel had directed the District Court to consider certain issues that it did not address, a petition for rehearing *en banc* was sought. That request was also denied and this petition ensued.

REASONS FOR GRANTING THE WRIT

This case involves a significant international law issue related to doing business in jurisdictions outside of the United States even though the critical aspects of the business transaction occurred in the United States. It is respectfully submitted that the factors enunciated by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) need to be readdressed when the result of dismissal for *forum non conveniens* forces a party to litigate issues outside of the United States even though initial aspects of the business transaction occurred within its borders.

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[2] The second dismissal order likewise failed to contain any language stating that it was dismissed without prejudice so long as the plaintiffs refiled it within a set period of time. A Rule 60 motion has been filed in the District Court seeking an amendment to the judgment to include this language. There is no decision to date in regard to this request.

In short, it is respectfully submitted that this Court should grant certiorari to clarify the *forum non conveniens* doctrine in light of the expanding field of international law related to business transactions that initiate in the United States but result in activities occurring outside of its borders.

The Supreme Court has explained that the doctrine of *forum non conveniens* protects a defendant from the plaintiff's "temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself," so that he can " 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." *Gilbert*, 330 U.S. at 507, 508, 67 S.Ct. at 842, 843. However, by utilizing the factors set forth in *Gilbert*, the District Court in this case concluded that St. Thomas was an improper forum for the portion of the litigation initiated by the plaintiffs but not an improper forum for the litigation related to the St. Thomas collateral or the related third party litigation initiated by the bank.

As such, this Court needs to clarify the purpose of the balancing test, particularly as it relates to business transactions that extend beyond the borders of the United States, in order to prevent the doctrine of *forum non conveniens* from becoming a test of which forum is the most convenient forum rather than an evaluation of whether the chosen forum is inconvenient, harassing and vexatious for a defendant to litigate in the chosen forum.

The importance of this issue is further magnified by the complications which occurred in this case where the

Court essentially "fractured" the issues between the parties, leaving some questions to be litigated in the United States while others could not be litigated in the United States. Absent some clarification on these issues, both borrowers and lenders throughout the United States run the risk of having to litigate issues related to international loan transactions in more than one forum, based on a balancing test that courts may utilize to decide which issues are convenient for United States litigation and which ones are not. The potential toward abuse of discretion absent further clarification is now present based upon the decisions rendered in this case.

Indeed, it is easy to understand why the Third Circuit did not issue an opinion on the second appeal as obviously there is no possible way to justify the dismissal of this case on the grounds that St. Thomas is an inconvenient forum. This is particularly true because of the scenario which occurred between the two appeals when Barclays itself invoked the jurisdiction of the District Court by filing a third party action against the Waechters.

Thus, it is respectfully submitted that this Court should admonish district courts to focus on the critical issue of whether or not it is vexatious, harassing or inconvenient for a party to litigate in a forum before it dismisses an action that effectively bars a litigant from the United States judicial system even though significant aspects of the transaction occurred in this country. Indeed, in this case, neither the District Court nor the Third Circuit made any finding that it would be inconvenient for Barclays to litigate in St. Thomas. Moreover, obviously no such finding could be made in this case

since St. Thomas was the chosen forum of Barclays in prosecuting certain issues related to this transaction.

Thus, the Third Circuit clearly erred in affirming the decision of the District Court in this case. Because this case involves significant issues related to international business transactions, it is respectfully requested that this Court grant certiorari, reverse the decision of the Third Circuit and set forth appropriate guidelines for situations where international business transactions take place creating questions related to the *forum non conveniens* issue.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-7308

NANNY CAY ENTERPRISES LTD.,
(previously C.D. Hunter Associates); CARIBBEAN
MARINE CENTER, LTD.,
and their subsidiary Nanny Cay, Ltd.;
B.V.I. PROPERTY MANAGEMENT;
NORBERT LORCK-SCHIERNING;
KLAUS WAECHTER;
D & C DEVELOPMENT, INC.

v.

BARCLAYS BANK PLC

Nanny Cay Enterprises, Ltd.
(previously C.D. Hunter Associates);
Caribbean Marine Center, Ltd. and
their subsidiary Nanny Cay, Ltd;
B.V.I. Property Management; Norbert
Lorck-Schierning; Klaus Waechter,
Appellants

Appeal from the District Court of the Virgin Islands
Division of St. Thomas and St. John
D.C. Civil Action No. 90-cv-00100
(Honorable James T. Giles)

Argued December 6, 1994

Before: SLOVITER, *Chief Judge*,
SCIRICA and COWEN, *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court entered May 2, 1994, be and is hereby AFFIRMED.

Costs taxed against appellants.

BY THE COURT,

/s/ Illegible
Circuit Judge

Attest:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk
DEC 16 1994

NOT-FOR-PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-7138

NANNY CAY ENTERPRISES, LTD., (PREVIOUSLY C.D. HUNTER ASSOCIATES); CARIBBEAN MARINE CENTER LTD., and their subsidiary NANNY CAY, LTD.; B.V.I. PROPERTY MANAGEMENT; NORBERT LORCK-SCHIERNING; KLAUS WAECHTER; D & C DEVELOPMENT, INC.

v.

BARCLAYS BANK PLC

Nanny Cay Enterprises, Ltd., (previously C.D. Hunter Associates), Caribbean Marine Center, Ltd., and their subsidiary Nanny Cay, Ltd., B.V.I. Property Management, Norbert Lorck-Schierning and Klaus Waechter,

Appellants,

On Appeal From the District Court
of the Virgin Islands
(D.C. Civil Action No. 90-00100)
District Judge: Honorable James T. Giles

Argued: December 8, 1992

Before: BECKER, COWEN and ROTH, *Circuit Judges*

(Opinion Filed Mar. 24, 1993)

OPINION OF THE COURT

ROTH, *Circuit Judge:*

This case arises from a dispute regarding Barclays Bank's financing of a project to develop a hotel and marina at Nanny Cay, Tortola, in the British Virgin Islands. Nanny Cay Enterprises, Inc. ("Nanny Cay") brought suit in the U.S. District Court for the Virgin Islands, contending that Barclays breached its fiduciary duties to it and its directors in administering Nanny Cay's loan. Barclays moved to dismiss on grounds of forum non conveniens, contending that this dispute centered upon, and that all the relevant witnesses and evidence were located on, Tortola. The district court agreed and, at a hearing on February 28, 1992, dismissed the present case on grounds of forum non conveniens. Because we find that the district court incompletely analyzed the facts of this case under the forum non conveniens doctrine, we will reverse and remand for proceedings consistent with this opinion.

I.

The facts of this dispute are as follows. The developers of the Nanny Cay project are Klaus Waechter and Norbert Lourck-Schierning. Both are German nationals who have been involved in substantial development projects in St. Thomas, U.S. Virgin Islands, as well as in the Nanny Cay project. Waechter also "is believed to divide his time between St. Thomas and his native Germany." Appellee's Br. at 4. It is unclear whether Waechter is actually a resident of St. Thomas. Moreover, Barclays contends that Schierning "is a resident of Germany." *Id.*

Appellants claim that Barclays breached its fiduciary duties to Waechter and Schierning and their corporation "CMC" and violated its duty of due care in administering a loan set up to finance the Nanny Cay project. The essence of this claim appears to be that the loan was limited to $2.25 million with $150,000 of overdraft privileges but that Barclays improperly authorized overdrafts much greater than the $150,000 limit. Appellants claim that this overdraft error and the manner in which it was handled caused substantial financial loss.

The loan at issue was distributed by Barclays' branch in Tortola. However, the loan required approval by Barclays' New York regional office. Subsequent to the original loan disbursement, Barclays reorganized and opened a regional office in St. Thomas with control over the Tortola Branch. The regional manager of this office reported directly to New York. When asked why the Tortola Branch reports through the regional office to New York, the regional manager, Mr. White, responded, "[b]ecause of its affinity to the United States and the – for administrative reasons, the bank made that decision." App. at 169-170. Moreover, the Tortola branch and Barclays' U.S. Virgin Islands branches use the same procedures for administering loans. Mr. White also testified that it would take no more that one hour to travel between St. Thomas and Tortola and that when Barclays' employees from New York traveled to Tortola they would often pass through the U.S. Virgin Islands. *See* app. at 182-184.

Apparently, when Barclays realized that it had extended CMC unauthorized overdraft credit, it sought additional collateral for its loan. Barclays and Waechter

arranged for this collateral by having Barclays refinance the debts accrued by another corporation, D & C, which was controlled by Waechter and Schierning and was in the process of developing condominiums on St. Thomas. This refinanced loan was secured in part by the St. Thomas property; It provided for the transfer of $650,000 from the D & C loan to Barclays' Tortola branch to further secure the loan to CMC.

After the refinancing of the D & C loan, there was some joint administration of that loan and of the CMC loan. The record indicates that the regional manager in St. Thomas may have had ultimate responsibility for both loans, *see* app. at 215-16, and an internal memo from the St. Thomas regional office explained the "necessity of keeping both the D&C and the Nanny Cay in the same focus." App. at 232. Subsequently, the CMC/Nanny Cay loan was taken over by Mr. Jani in Barclays' New York office and the eventual default notice was sent from New York.

On February 12, 1990, Barclays' filed suit against D & C and Waechter to foreclose against the D & C condominium project, claiming that the D & C loan was in default. Eventually, Waechter consented to a settlement in that foreclosure action and gave up control of D & C. Before execution against the D & C property, D & C filed for Chapter 11 bankruptcy. The bankruptcy court appointed a trustee to pursue D & C's claims, including possible claims against Waechter. In the present action, in which D & C was initially a named plaintiff, the trustee moved to sever its claims because of an alleged divergence of interests with the remaining plaintiffs. The district court granted the motion to sever. *See* app. at 52.

With regard specifically to Barclays' motion to dismiss on grounds of forum non conveniens, Barclays had initially identified 3 St. Thomas witnesses, 6 Tortola witnesses and 5 witnesses from other areas as relevant. *See* app. at 233. Appellants contend that Waechter and Michael Dow, the Barclays' St. Thomas branch manager who made the D & C loan, are essential and are located in St. Thomas. Moreover, Mr. White, the St. Thomas regional manager, testified that all but two of the Tortola witnesses are bank employees. *See* app. at 185-89.

Based upon its analysis of the forum non conveniens issue, the district court dismissed the case. Its entire discussion consisted of:

> "[T]here is a motion to dismiss for forum non conveniens. That motion is granted.
>
> However, the motion is that – that it is dismissed without prejudice to its being filed in the British Virgin Islands within thirty days. If so, the allegations made will relate back to the date that the complaint was filed here.
>
> I have no authority, I don't believe, to transfer this action to the British Virgin Islands. However, I can fashion the order of dismissal without prejudice to it being filed within the time allowed.
>
> This transaction remains Civilian [sic] Number 100, is a Tortola transaction. It involves Tortola property. It involves the Government of the British Virgin Islands. It involves the bank that was in the British Virgin Islands.
>
> All of the pertinent witnesses are located in the British Virgin Islands, and there will be a need, undoubtedly, for the exercise of subpoena

power under the laws of the British Virgin Islands of residents and of documents located in the British Virgin Islands, as to which this Court has no authority.

Although the plaintiff's choice of forum normally is given great weight, it is not dispositive. I find that under the facts and circumstances of this case and in the interest of justice, this action should be brought in the British Virgin Islands, where the transactions occurred and where its ramifications continue to play out.

Barclays is just as suable in the British Virgin Islands as it is in St. Thomas. But the alleged gravamen of the action was that there was an overdraft caused in Tortola. It is a mystery to me how an overdraft could have been caused by the Barclays Bank in Tortola to the detriment of Mr. Waechter, without the knowledge, consent of Mr. Waechter in his or plaintiff's use of the money.

To the extent that there is such a claim possible, it would possibly involve the application for resort to banking laws of the British Virgin Islands as to what constitutes appropriate relationship between lenders and lendees.

All of that will militate in the action being brought there, as the finding is that the action made here is inappropriate."

App. at 77-78.

II.

The district court had subject matter jurisdiction pursuant to 48 U.S.C. § 1612 and V.I. Code Ann. tit. 4, § 32(a)

(Supp. 1992). This Court has appellate jurisdiction over this final order to dismiss pursuant to 28 U.S.C. § 1291.

The standard of review is whether the district court abused its discretion in dismissing the underlying case under the doctrine of forum non conveniens. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). The trial court's decision to grant or deny a forum non conveniens motion "should be an exercise in structured discretion founded on a procedural framework guiding the district court's decision making process." *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43 (3d Cir. 1988).

Forum non conveniens determinations " 'represent exercises of structured discretion by trial judges appraising the practical inconveniences posed to the litigants and to the court should a particular action be litigated in one forum rather than another.' " *Lony v. E.I. DuPont de Nemours & Co.*, 886 F.2d 628, 632 (3d Cir. 1989) ("*Lony I*") (quoting *Pain v. United Technologies Corp.*, 637 F.2d 775, 781 (D.C. Cir. 1980)).

> "A district court entertaining a forum non conveniens motion must first decide whether an adequate alternative forum exists to hear the case. Furthermore, the court should also consider that a foreign plaintiff's choice of an American forum is entitled to less deference than an American citizen's choice of his home forum. If there is an adequate alternative forum, the district court must consider and balance several private and public interest factors that are relevant to the forum non conveniens determination."

Lony I, 886 F.2d at 633 (quoting *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43 (3d Cir. 1988) ("*Lacey I*")).[1] In the present case, the district court failed in a number of contexts to analyze fully the issues presented by this forum non conveniens claim.

A. Adequate Alternative Forum and Deference to Plaintiff's Choice of Forum Analyses

"Under *Piper*, a district court must 'consider the availability of an adequate alternative forum and the amount of deference to be accorded the plaintiff's choice of forum before it weighs the private and public interest factors relevant to the forum non conveniens inquiry.' " *Lony I*, 886 F.2d at 633 (quoting *Lacey I*, 862 F.2d at 45). With regard to the adequacy of an alternative forum, this requirement generally is satisfied "when the defendant is 'amenable to process' in the other jurisdiction." *Piper*, 454 U.S. at 254 n.22. "Occasionally, however, if the alternative forum offers a clearly unsatisfactory remedy, it will nonetheless be inadequate. The latter situation arises, for instance, when the subject matter of the suit is not cognizable in the alternative forum." *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 180 (3d Cir. 1991) ("*Lacey II*").

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[1] At oral argument, both parties agreed that the forum non conveniens analysis prescribed by the federal law of this circuit is, for purposes of the present case, identical to that legislated by the Virgin Islands. *See* V.I. Stat. Ann. tit. 4, § 4905. Therefore, we need not address the interesting question of whether Virgin Islands or federal law generally applies in diversity cases originating in the District Court of the Virgin Islands.

Appellants contend that the British Virgin Islands would be an inadequate alternative forum because its rules of procedure might foreclose access to sources of proof that appellants believe are crucial. Specifically, they claim that the British Virgin Islands legal system permits an attorney only to recommend witnesses to the court, that production of documents and attendance of witnesses outside the British Virgin Islands cannot be compelled, and that pretrial discovery is "nonexistent." *See* Appellants' Br. at 12. The district court's entire examination of this claim was the statement, "Certainly there is justice in the British Virgin Islands." App. at 70.

While "U.S. courts generally appear reluctant to deny dismissal merely because foreign procedures differ from those in the United States," Gary B. Born & David Westin, *International Civil litigation in United States Courts* 239 (1990), this Court has previously done so. In *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611, 614 (3d Cir.), *cert. denied*, 385 U.S. 945 (1966), this Court held that dismissal of a case in favor of litigating in Venezuela was inappropriate in light of the limited discovery rules and restrictions on expert witness testimony present in that forum. More recently, in *Lacey II*, this Court reversed the district court's decision to dismiss the suit based on forum non conveniens because it was possible that the plaintiff would be denied access to essential sources of proof in the alternative forum, British Columbia. *See Lacey II*, 932 F.2d at 186. While the Court in *Lacey II* analyzed the question of access to proof under the rubric of "private interest factors," the court acknowledged that the essence of Lacey's claim was not "that British Columbia is an *inconvenient* forum, but that it is an *inadequate* forum.

Id. Moreover, the Court conceded that "it might have been more logical to address [this claim] under the 'inadequate alternative forum' rubric." *Id.* at 186 n.13. Additionally, Judge Pollak's concurrence in *Lacey II* states explicitly that access to essential proof should be considered "under the 'inadequate alternative forum' rubric." *Lacey II*, 932 F.2d at 190 (Pollak, J., concurring).

In the present case, the district court did not substantially evaluate the adequacy of the British Virgin Islands as an alternative forum. Appellants have alleged that it would be impossible to obtain essential documents and testimony from Barclays' St. Thomas branch were their claims heard in the British Virgin Islands. This argument is rather similar to that accepted by this Court in *Lacey II* and deserves at least *some* analysis. We find that, because the district court failed to heed the dictates of *Lacey II* in light of appellants' challenges to the adequacy of the British Virgin Islands as an alternative forum, we will remand this case for an appropriate examination of whether the British Virgin Islands is an adequate forum.[2]

With regard to the appropriate level of deference due a plaintiff's choice of forum, "a district court abuses its discretion . . . when it fails to consider adequately and to determine the amount of deference due the foreign plaintiff's choice of forum." *Lacey II*, 932 F.2d at 178. With a

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[2] Appellees argue that it is irrelevant that the courts in the British Virgin Islands may not provide the same remedies as would U.S. courts. *See* Appellee's Br. at 15 & n.17. This argument is inapposite. Appellants problem with the courts of the British Virgin Islands is not that they provide limited remedies but that sources of proof essential to any remedy would be unavailable.

domestic plaintiff, "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum." *Piper*, 454 U.S. at 255. With a foreign plaintiff such a presumption "applies with less force," *id.*, because in such a case there is a "reluctance to assume that the choice [of forum] is a convenient one." *Lacey II*, 932 F.2d at 178. However, "[w]here a foreign plaintiff has made a strong showing of convenience, . . . the district court must indicate how far that showing goes toward putting the foreign plaintiff on the same footing as a domestic plaintiff." *Lony I*, 886 F.2d at 634.

In the present case, the district court analyzed the plaintiff's forum choice with the following sentence, "Although the plaintiff's choice of forum normally is given great weight, it is not dispositive." App. at 77-78. Such analysis simply is not sufficient. Appellants have argued that it is convenient to litigate in St. Thomas because the principal individual plaintiff, Waechter, resides there and because crucial documents and witnesses are located there. These contentions may have merit, and under *Lony I*, the district court is required to explain how it weighs this showing of convenience. We are confident that, on remand, the district court will explain how the plaintiff's choice of forum factors into its forum non conveniens weighing process.

B. Public and Private Interest Analysis

After a court has properly analyzed the adequacy of any alternative forum for litigation and has appropriately considered the level of deference due a plaintiff's choice of forum, it must balance several private and public

interest factors to determine whether a case should be dismissed on forum non conveniens grounds. "[T]he plaintiff's choice of forum should rarely be disturbed unless the balance of factors is strongly in favor of the defendant." *Lacey I*, 862 F.2d at 43. In arriving at its decision, the district court must consider all of the relevant private and public interest factors. "[W]here the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Id.* (quoting *Piper*, 454 U. S. at 257), *see also Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1334 (9th Cir. 1984) (noting that the failure to consider relevant public and private interest factors constitutes an abuse of discretion).[3]

With regard to private interest factors, a court must examine:

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[3] There are three possible conceptions of the private and public interest balancing framework for forum non conveniens analysis. First, it is possible that a court would separately balance the private and public factors and could dismiss a case only if both factor balances strongly favored dismissal. Second, it is possible that a court could similarly balance the private and public factors but dismiss if either balance strongly favored dismissal. Third, it is possible that the court could perform one balance, incorporating both private and public factors, and dismiss if this balance strongly favored dismissal. It appears that this Court has adopted the last approach. *See Lacey II*, 932 F.2d at 180 ("To prevail on a forum non conveniens motion, the movant must show that *the balance* of these [private and public interest] factors tips decidedly in favor of trial in the foreign forum") (emphasis added).

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Lony v. E.I. DuPont de Nemours & Co., 935 F.2d 604, 609 (3d Cir. 1991) ("*Lony II*") (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). This analysis is geared to an ultimate conclusion that litigating in the plaintiff's chosen forum " 'would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to a plaintiff's convenience' " if dismissal is appropriate. *Lony II*, 935 F.2d at 608 (quoting *Piper*, 454 U.S. at 241).

In the present case, the district court did articulate and to some extent analyze the relevant private interest factors. The district court spent time questioning counsel about the factors of the relative ease of access to sources of proof and availability of compulsory process for attendance of unwilling witnesses. *See* app. at 70-78. However, there are at least two substantial problems with the district court's analysis. First, there is no mention whatsoever of the cost of obtaining attendance of willing witnesses. This factor is important in a case such as this where each party argues that its chosen forum contains the bulk of relevant witnesses. Second, the district court made a clearly erroneous factual conclusion regarding the location of witnesses in this case when it stated that, "[a]ll of the pertinent witnesses are located in the British Virgin Islands." App. at 77. Even Barclays had admitted that at least three pertinent witnesses are located in St.

Thomas and that at least five pertinent witnesses are located elsewhere. *See* app. at 233. Therefore, we conclude that it is appropriate to remand for further private interest analysis.

With regard to the public interest analysis, a court must examine:

> the administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home'; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Piper, 454 U.S. at 241 n.6 (quoted in *Lony II*, 935 F.2d at 612). "In evaluating the public interest factors the district court must 'consider the locus of the alleged culpable conduct, often a disputed issue, and the connection of that conduct to plaintiff's chosen forum.' " *Lacey I*, 862 F.2d at 49 (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528 (1988)).

The only public interest analysis performed by the district court determined that the locus of the conduct at issue was, according to the district court, in Tortola, and that British law "possibly" would apply to plaintiffs' claims. *See* app. at 77-79. The district court made no mention of administrative difficulties flowing from court congestion, any unfairness of burdening St. Thomas's citizens with jury duty, or any analysis of St. Thomas's interest in having this case litigated in St. Thomas. These

omissions are problematic. Appellants assert that their claim involves a pattern of illicit loan administration that included improper coercion of Waechter into securing his CMC/Nanny Cay loan with his D & C/St. Thomas property. The resolution of this allegation appears to implicate St. Thomas because it involves a substantial business venture and source of housing in St. Thomas.

Barclays argues that this loan claim is now irrelevant because D & C has been severed from this case. This argument is unpersuasive. Appellants contend that the D & C loan problems were part of the pattern of improper loan administration that directly harmed Nanny Cay and CMC. The only reason D & C's claims were severed is that D & C is now in bankruptcy and its interests are adverse to Waechter and Nanny Cay. However, while D & C's claims as a plaintiff are now arguably irrelevant to the resolution of the present case, the course of events involving the D & C loan from Barclays is an essential part of it. The severance of the claims of a bankrupt corporation does not mean that the sequence of events that resulted in that corporation's bankruptcy become unimportant. The district court, however, presented no analysis with regard to the impact of the D & C loan to the Nanny Cay project when there is at least some evidence in the record that indicates a connection between the two. *See* app. at 232.

Furthermore, the district court's choice of law analysis was incomplete. Because of its initial analysis regarding the locus of the present dispute, the district court failed to predict what law would apply in the present case. A statement that "possibly" foreign law might apply

does not justify dismissing a case for forum non conveniens. Under Virgin Islands law, whether this case is conceived as a contract or a tort dispute, the law of the jurisdiction with the "most significant relationship" to the breach of performance or the tortious injury would control. *See Pitterson v. Santoni*, 19 V.I. 46 (D.V.I. 1980) (applying Restatement 2d of Conflict of Laws); Restatement 2d of Conflict of Laws §§ 145, 187, 291.[4] Therefore, if it were persuasively argued that, as appellants allege, the actual injury that forms the basis of the present case took place in St. Thomas, where Barclays' policies of loan administration were formulated and where the refinancing of the D & C loan was located, U.S. law might control. In any event, we conclude that the district court must more comprehensively analyze the public interest factors on remand.

In the present case, the district court inadequately examined the issues crucial to a proper dismissal for forum non conveniens. On remand, the district court must comprehensively address the adequacy of the British Virgin Islands as an alternative forum and the deference due the plaintiff's choice of forum; it must also fully explain how it balances the relevant private and public interest factors.

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[4] In the Virgin Islands, "[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary." V.I. Code Ann. tit. 1, § 4. There is no statutory or case law that displaces the Restatement position on conflict of laws.

III.

For the foregoing reasons, we will reverse and remand for proceedings consistent with this opinion.

TO THE CLERK:

Please file the foregoing Opinion.

By the Court,

/s/ Roth
Circuit Judge

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

NANNY CAY ENTERPRISES, LTD., (PREVIOUSLY C.D. HUNTER ASSOCIATES); CARIBBEAN MARINE CENTER, LTD., and their subsidiary NANNY CAY LTD.; B.V.I. PROPERTY MANAGEMENT, NORBERT LORCK-SCHIERNING, KLAUS WAECHTER, and D & C DEVELOPMENT, INC.,	)	CIVIL NO. 100/1990
Plaintiffs,	)	ACTION FOR DAMAGES
vs.	)	
BARCLAYS BANK PLC,	)	
Defendant.	)	

ORDER

THIS MATTER came before the Court on February 28, 1992 to consider, among other things, the motion to dismiss on the grounds of *forum non conveniens* filed by Barclays Bank PLC ("Barclays"). Plaintiffs appeared through their counsel, Gertrude LeCointe, of the Law Offices of Joel H. Holt, and Barclays appeared through its counsel, Gregory H. Hodges, of Dudley, Topper and Feuerzeig. Warren B. Cole made a special appearance as counsel for the Chapter 11 Trustee for D & C Development, Inc. ("D & C"). Having considered the parties' respective arguments and having severed D & C from this

action by Order of even date, the Court dictated its findings of fact and conclusions of law into the record. For all the reasons read into the record,

IT IS ACCORDINGLY ORDERED that Barclays motion to dismiss on the grounds of *forum non conveniens* is granted and this action is hereby dismissed without prejudice. ~~provided~~ [If (JG)] plaintiffs refile their complaint in a ~~court of appropriate~~ jurisdiction [other than the (JG)] ~~in Tartole, British~~ [United States Virgin Islands (JG)] within thirty days of the date of this Order, ~~IT IS FURTHER ORDERED, that if plaintiffs refile their complaint as provided above~~, the claims asserted in such complaint will relate back to the date of the complaint in this matter to the extent such claims arose out of the conduct, transaction, or occurrence set forth in the complaint filed herein.

ENTERED this 2nd day of March, 1992.

/s/ James T. Giles
James T. Giles
U.S. District
Court Judge
(sitting by designation)

ATTEST:

Clerk of the Court

By: /s/ Frank Blackman
Deputy

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

NANNY CAY ENTERPRISES, LTD., et al. Plaintiffs, v. BARCLAYS BANK PLC Defendants.	CIV. NO. 100/1990

MEMORANDUM

This cases [sic] arise from a default by owners and developers of a hotel and marina complex in Nanny Cay, Tortola, British Virgin Islands on a loan made by Barclays Bank ("Barclays"). The original and two subsequent amended complaints allege, *inter alia*, that Barclays breached a fiduciary duty to Norbert Lorck-Schierning and Klaus Waechter, the owner-developers, in its administration of the Nanny Cay loan and also failed to restructure the loan agreement as provided to ensure that there would be no default by the borrowers.

On August 20, 1990 the defendants moved to dismiss the action based on *forum non conveniens*. At a hearing on February 28, 1992 this court granted the motion. Appeal was taken to the third circuit, which reversed and remanded the matter for further review because the district court "incompletely analyzed the facts of this case under the forum non conveniens doctrine." Barclays renewed its motion for dismissal on *forum non conveniens*

grounds, which motion continues to be opposed vigorously by plaintiffs. Oral argument was heard on April 12, 1994. Seeking to clarify their contentions, plaintiffs filed a proposed first amended complaint on the morning before argument and later a proposed second amended complaint to withdraw a count. The court has allowed the second amended complaint. The new pleading does not affect the analysis pertinent to consideration of the motion. Having considered the parties' submissions and arguments, the court grants defendant's motion for dismissal without prejudice to the claims being asserted in Tortola, B.V.I.

FACTS

On October 15, 1986 Barclays' branch office in Tortola agreed to lend plaintiff Caribbean Marine Center, Ltd. ("CMC") $2.5 million, with overdraft privileges of $150,000, for the development of a condominium hotel and marina there. The loan was made and administered by Barclays' Tortola branch, and although final loan approval by the New York office was required, it was the Tortola branch to which the loan application was made and which evaluated and recommended the package. Further, all administration of the loan, including receiving and acting upon plaintiffs' construction requisitions were committed to the Tortola branch. All documentation evidencing the loan, as well as the collateralizing documentation involving Tortola properties, were executed by plaintiffs in Tortola. The developers, Waechter and Lorck-Schierning, are both German nationals. It is unclear where Waechter resides, although he is "believed to

divide his time between St. Thomas and his native Germany." Appellee's Brief at 4. The defendant asserts that Lorck-Schierning resides in Germany. The corporate plaintiffs, Nanny Cay Enterprises, Ltd. (previously C.D. Hunter Associates), Caribbean Marine Center, Ltd., their subsidiary Nanny Cay, Ltd., and B.V.I. Property Management are B.V.I. companies.

By September of 1987, the development was having difficulties because of cost overruns. Plaintiffs allege that Barclays permitted an unauthorized overdraft to be created in excess of $1,000,000. Although their architects and engineers submitted requisitions for funds essential for timely prosecution of the construction work, plaintiffs contend that their agents were not authorized to create overdrafts beyond the $150,000 limit set in the loan documents, and that the excess overdrafts permitted by the bank's agents were therefore unsecured.

At about this time, Barclays reorganized its branches such that the Tortola branch reported to the St. Thomas office, rather than directly to the New York office as it had previously. As a means of obtaining security for the CMC overdraft, plaintiffs contend that Barclays wrongfully pressured Waechter to refinance the debts of another project under his control in St. Thomas, known as the D & C Development, Inc. ("D & C"), and to use proceeds therefrom to purchase certificates of deposit for delivery to Tortola as security for the overdrafts. Plaintiffs contend that Waechter's agreement to refinance D & C St. Thomas assets through Barclays and his pledging of additional collateral for the overdrafts, thereby giving security that he was not obligated to give, constituted good, lawful and sufficient consideration for the alleged

agreement by Barclays to restructure the Nanny Cay loan upon completion of the Nanny Cay project. After the project's completion, plaintiffs defaulted on the loan. Allegedly, Barclays' failure to restructure the loan made it impossible for them to meet the debt obligations. Barclays denies that an agreement to restructure ever existed.

Upon declaration of plaintiffs' loan default, Barclays instituted receivership proceedings in Tortola, applying the laws of the B.V.I. to the terms of the Tortola loan documents. Collateral pledged in Tortola was necessarily impacted by the receivership proceedings.

D & C, a corporation and project in St. Thomas, corporately unrelated to Nanny Cay, also defaulted on its Barclays loan. Barclays brought suit in St. Thomas against D & C, which answered that complaint but asserted no counterclaim. Nevertheless, when this action was brought by plaintiffs in St. Thomas, D & C somehow joined with them, asserting that Barclays

> forced, coerced, and pressured Plaintiff's Waechter (sic) to refinance a loan to Defendant by D & C Development, Inc., in order to provide a source of funds due to said plaintiffs to be invested into the above account of Nanny Cay.

D & C's action against Barclays was severed by the court at the February 28, 1992 hearing. Review showed that D & C's interests were antagonistic to the other plaintiffs in that D & C asserted, essentially, that the consideration tendered by Waechter to Nanny Cay was unlawfully obtained from it and must be recouped to D & C.. Subsequently, D & C filed for relief in the U.S. Bankruptcy Court in St. Thomas, claiming unlawful

actions by Barclays and Waechter concerning the entire D & C loan.[1]

Plaintiffs have already brought two actions against Barclays in Tortola's High Court of Justice, alleging breaches of duty in administering the Nanny Cay loan. In one, plaintiffs sought to displace the Receiver appointed by Barclays, claiming that he or his firm had previously served as the auditor for the Nanny Cay development project and therefore had a conflict of interest. Plaintiffs there also alleged that the Receiver had refused to provide certain financial information requested by Waechter, which plaintiffs contend were documents owned by them. Under supervision of the High Court of Justice, the Receiver maintains control over all of the project's construction-related documents, whether owned by plaintiffs or not. After a trial on the merits, the High Court of

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[1] D & C alleged that Barclays and Waechter conspired to defraud the company by causing it to take out a loan that Barclays knew or should have known lacked proper authorization. Barclays asserted a third party indemnity claim against Klaus and Rosemarie Waechter and D & C's St Thomas attorney Rhys Hodge, whom it claims represented that Waechter had the authorization to make such a loan agreement. The Waechters have asserted third party counterclaims against Barclays regarding both the St. Thomas-based D & C loan and the Tortola-based Nanny Cay action. Barclays has moved to sever these counterclaims, on the grounds that the Nanny Cay claims are already being litigated in the instant action. Presently, Barclays is in the process of settling the D & C shareholder claim against it, leaving only the indemnity action against the Waechters and Hodge. The Bankruptcy Court may ask this court to withdraw reference as to the remaining claims. For the reasons stated above, the D & C issues remain legally distinct from plaintiffs' Nanny Cay theory against Barclays.

Justice entered judgment in favor of Barclays, finding no evidence of a refusal to turn over documents and that the loan documents plainly accorded to Barclays the right to appoint "any person" to serve as Receiver.

DISCUSSION

1. Forum Non Conveniens Review Standard

Generally, a plaintiff's choice of forum is given great deference. Under the doctrine of *forum non conveniens*, however, a court may determine that the chosen forum is not the appropriate one given the practical inconveniences to the parties. *See Lony v. E.I. DuPont de Nemours & Co.*, 935 F.2d 604 (3d Cir. 1991) ("*Lony II*"); *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170 (3d Cir. 1991) ("*Lacey II*"); *Lony v. E.I. DuPont de Nemours & Co.*, 886 F.2d 618 (3d Cir. 1989) ("*Lony I*"); Lacey v. Cessna Aircraft Co., 862 F.2d 38 (3d Cir. 1988) (hereinafter *Lacey I*). While no one factor is dispositive, the third circuit has illuminated three primary areas for the court's inquiry.

First, the court must determine whether there is an adequate alternative forum for the action in dispute and the amount of deference to be given to the plaintiff's choice of forum. Generally, the adequate alternative requirement is satisfied "when the defendant is 'amenable to process' in the other jurisdiction." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n. 22 (1981). In certain circumstances, however, a forum will be considered inadequate if the alternative forum offers a "clearly unsatisfactory remedy," e.g., when the action would not be a cognizable one in the alternative forum. *Lacey II*, 932 F.2d at 180.

If another forum is determined to be adequate, the court must then balance several public and private interest factors to determine whether the case should be dismissed on *forum non conveniens* grounds. *Lacey I*, 862 F.2d at 43. The third circuit has enumerated the private interest factors as

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Lony II, 935 F.2d at 609 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). With regard to the public interest analysis, the court must examine

> the administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home'; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Lony II at 612 (quoting *Piper*, 454 U.S. at 241 n. 6).

With the third circuit's mandate in mind, and a close examination of the interests and circumstances in this action, the court finds again that Tortola is the more appropriate and convenient forum for the litigation of this case.

2. Adequate Alternative Forum

Plaintiffs do not contend that Barclays would not be "amenable to process" in the B.V.I. Indeed, Barclays has long operated a branch office in Tortola and was served with process there by the plaintiffs in its two actions before Tortola's High Court of Justice. Rather, they assert that the B.V.I. offers an unsatisfactory measure of remedy because it may not recognize all their stated causes of action as cognizable claims. The plaintiffs dispute an affidavit by Lewis Hunte, a B.V.I. attorney, which asserts that the Tortola Court would hear their claims. In support of their contentions, plaintiffs have submitted an affidavit from Gerard St. C. Ferara, a B.V.I. barrister, who opines that the B.V.I. would recognize only those actions that arose in the B.V.I., not those that arose elsewhere and merely caused injury within that jurisdiction.

In a second affidavit by Lewis Hunte, he states that

> If the claim against Barclays Bank PLC ("the Bank") is that the alleged wrongful conduct consisted of actions taken by the Bank to restructure the Nanny Cay loan, or to require additional security as a condition of making further advances on that loan, the High Court of the British Virgin Islands would have jurisdiction to entertain this claim. The fact that those actions may have been reviewed, approved or even initiated by the Bank's officials outside the Territory would not deprive the court of jurisdiction, provided that those actions related to a loan made by the Tortola branch of the Bank.

The court is satisfied that the B.V.I court would recognize all essential causes of action asserted by plaintiffs. The Nanny Cay loan was made in Tortola, although its later administration may have been routed through St. Thomas. The loan concerned property located in Tortola and ultimately defaulted there. Further, it is evident from a close examination of plaintiffs' claims that the cause of action arose in Tortola and not in St. Thomas as the plaintiffs have asserted.

In Count I of their Second Amended Complaint, plaintiffs allege that Barclays threatened to withhold authorized construction funds as a means of inducing additional security for the benefit of the bank. This count charges that these threats caused construction delays on the Nanny Cay project or led prospective purchasers not to complete tentative agreements. While plaintiffs attempt to create a St. Thomas connection by emphasizing the involvement of the St. Thomas branch of Barclays, the focus of this claim is clearly the construction in Tortola, the funds disbursed there, and the business opportunities allegedly lost there.

Counts II and III of the Second Amended Complaint allege, in essence, a negligent and/or intentional breach of agreement to restructure the loan for the Nanny Cay project. The Complaint states that "The bank failed to abide by the representations made by Waechter after the collateral was pledged, resulting in financial losses to the Nanny Cay project in the form of both direct and consequential damages." Second Amended Complaint at ¶ 36. As stated previously, the loan was made in Tortola, concerned Tortola property and was defaulted on there.

These counts make it clear that any damages suffered by plaintiffs were centered in Tortola.

Count IV claims that Barclays owed plaintiffs a fiduciary duty to act in good faith at all times relevant to the Nanny Cay loan, and that its failure to disclose promptly the extent of the overdraft constituted a breach of this duty. Plaintiffs assert that Barclays thereafter improperly demanded that plaintiffs secure an unauthorized loan when it may not have been in plaintiffs' interest to do so, that is, when they may have been able to withdraw from the project, cutting their losses or liabilities. As mentioned above, the overdraft was created in Tortola where the construction was occurring, and any abandonment or other ameliorative steps, and the effect thereof, would have taken place there.

Count V alleges that the Receivership action taken by Barclays in Tortola was undertaken to eliminate plaintiffs' presence at the Nanny Cay project and to secure possession of plaintiffs' financial records, thereby limiting their ability to transact business in the B.V.I. The court finds that this cause of action arises solely in Tortola. The Receiver is in Tortola functioning under the banking laws of the B.V.I. Furthermore, all the relevant documents and financial records are strictly within the custody and control of the B.V.I. High Court of Justice, whose administration is ongoing.

Finally, Count VI alleges that "[t]he aforementioned actions of the bank taken after the unauthorized overdraft was disclosed to bank officers in St. Thomas and New York were done with the express intent of inducing the plaintiffs to pledge security for the project even

though the bank knew that it would attempt to take possession of the property once it had obtained as much collateral as possible from the plaintiffs." Second Amended Complaint at ¶ 52. Despite plaintiffs' claim that these actions were made "through its officers in St. Thomas and New York," *Id.* at ¶ 53, it was personnel of the Tortola branch who were primarily responsible for actions taken in administering the loan made in Tortola. The fact that officers in New York or St. Thomas may have had some involvement in bank policy does not shift the focus of plaintiffs' loss-related allegations away from Tortola.

Plaintiffs offer various other factors regarding litigation in the B.V.I. in an effort to demonstrate that Tortola provides an inadequate forum. For example, they assert that the B.V.I. court lacks certain advantages available in a United States court, including jury trials, court reporters and various discovery procedures. The court disagrees. The first affidavit by Lewis Hunte demonstrates that most of these differences in court procedures are minimal. Jury trials are, in fact, available, as are court reporters in most courts. The plaintiff would have access to any necessary proof at trial, including witnesses and documents, the relevant ones of which are currently within the B.V.I. court's custody or control. The plaintiff has failed to offer any evidence to support its argument that it would be severely disadvantaged in the British court system.

3. Private Interest Analysis

The balance of private interest factors strongly favors dismissal of this action so that it can be filed in Tortola.

First, the claims of the remaining plaintiffs, discussed above, center primarily on construction cost overruns that occurred during the development of Nanny Cay in Tortola and Barclays handling of the Nanny Cay loan. Plaintiffs, themselves, in their Second Amended Complaint tie the agreement to restructure the Nanny Cay loan in with completion of the project in Tortola. *See id* at ¶ 14. It is clear to the court, therefore, despite plaintiffs' arguments to the contrary, that most of the necessary witnesses, including all of the corporate plaintiffs, are located in Tortola or within the subpoena power of the B.V.I. court.

These witnesses include Barclays employees who were responsible for the granting of the Nanny Cay loan and disbursement of funds in Tortola, including but not limited to Geoffrey Williams, Brian Sollitt and Thelma Penn. Other necessary witnesses include former CMC employees who requested the construction overdrafts in question, such as Chuck Hunter, Alan Smith, and Brian Jackson. All of these individuals currently reside in Tortola. Contractors and suppliers who were involved in the construction of Nanny Cay will likely be necessary for testimony as to what work was authorized and completed, as will witnesses capable of testifying as to whether plaintiffs would have gained by abandoning the Nanny Cay project had they been informed earlier of the extent of the overdraft. Finally, officials of the government of the B.V.I. would be necessary witnesses to testify about whether plaintiffs' alleged lost business opportunities were the result of Barclays' actions or the character of their own dealings with the government. For example, there is a suggestion that significant delays in

the construction were caused by governmental delays in approval of licenses. Opposition to Barclays' Forum Non Conveniens Motion, Memorandum from Sollitt to White, Jan. 12, 1989, p.3.

At the hearing on February 28, 1992, plaintiffs were able to put forth the names of only two witnesses whose testimony would be relevant to their claim that Barclays released draws on the construction loan without Waechter's approval. The first was Mr. Waechter himself. The other was Michael Dow, a former bank employee now residing in St. Thomas. Since then, plaintiffs have identified several other individuals who they assert live in St. Thomas or beyond the subpoena power of the B.V.I. court. However, they have failed to demonstrate to the court how these witnesses are essential to the issues remaining in this case, e.g. the cost overruns that occurred in Tortola. On the other hand, defendants have sufficiently demonstrated that the critical witnesses are to be found in Tortola, that they are beyond the subpoena power of the United States court, and that the cost of transporting those willing witnesses tips the balance in favor of trial in Tortola.

Similarly, trial in the B.V.I. would provide both parties with a greater ease of access to necessary documents. First, it is important to note that, for purposes of private interest analysis, the critical factor is "access to proof *at trial.*" *Lacey II*, 932 F.2d at 185 n.2. Accessibility before trial, i.e. during pre-trial discovery, is irrelevant. Most of the relevant documentation is located in the files of Barclays' Tortola branch or is in the possession of the Receiver appointed to oversee the plaintiffs' holdings,

also in Tortola. While plaintiffs have made vague references to materials they seek from New York or St. Thomas, they have failed to offer a sufficient explanation of what other documents they would require to prove their damages case. The court is sufficiently clear, however, that almost all of the damage claim documents are located in Tortola, many being under the control of the Receiver who is not under the control of this court.

4. Public Interest Factors

An examination of the public interest factors suggested by the third circuit militates in favor of dismissal of this action. First, the locus of this dispute is plainly Tortola. The real property at the heart of the issue is there, the loan was made and disbursed there, and the loan was ultimately defaulted on there. The fact that the St. Thomas branch of Barclays was eventually placed in the line of command does not change these facts, nor does the fact that a St. Thomas property (the D & C property) was used as collateral. At the time of this reorganization, in late 1987, allegedly unauthorized overdrafts had already been made and subsequent events did not change the locus of the dispute.

Second, conflicts of law rules require that B.V.I. law be applied to this case. The Restatement (Second) of Torts, § 145, provides that the court must apply the law with the "most significant relationship to the occurrence and the parties." The choice of law analysis must include the following factors: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality,

place of incorporation, and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered.

The court has already determined that this action arose in Tortola. The plaintiffs' allegations are that the bank allowed construction cost overruns to accumulate and that draws were released without proper authorization. These could only have occurred in Tortola, where the disbursements were being made. Similarly, the complained-of conduct was the administration of the loan by Barclays in Tortola, not the banking policies of the St. Thomas or New York branches of Barclays.

As mentioned previously, all the corporate plaintiffs are located in Tortola. Waechter resides in both Germany *and* St. Thomas, while Lorck-Schierning resides solely in Germany, thereby making St. Thomas no more convenient for him than Tortola would be. Furthermore, the claims involving D & C, the only corporate plaintiff located in St. Thomas, were severed from this action.

A choice of law analysis requires the law of the B.V.I. to be applied in this action. Despite plaintiffs' assertion that this would cause little inconvenience to this court because "the laws would be in English," the court believes that presentation of these claims in Tortola would better serve the interests of consistency, convenience and judicial economy. For example, despite a ruling from the High Court of Justice in Tortola that Barclays had a contractual right to appoint the present Receiver, that no prejudice had been proven to have been caused by the appointment, and that that Court remains open to any such claims of prejudice by the Receiver, plaintiffs

ask in Count V of their Second Amended Complaint that this court find that the appointment was unlawful and prejudicial.

Another public interest factor that requires dismissal of this action is the unfairness of burdening the St. Thomas court and jury with trying a case in which there is no local interest. Any St. Thomas interest and obligation will be aired and discharged totally in the separate litigation involving D & C's claims against plaintiffs and Barclays. If a St. Thomas court or jury finds that Waechter had no authorization to borrow against D & C property, and therefore as a matter of law he pledged no lawful consideration in Tortola, that may well preclude plaintiffs' claims in Tortola. Likewise, the D & C trial could determine, in effect, that good consideration was given for restructuring the Tortola loan.

The citizens of the U.S. Virgin Islands should not be burdened with litigation such as this that is so centered in a foreign jurisdiction. Here, the citizens' right to expeditious disposition of cases is already frustrated by a longstanding case backlog. The administrative difficulties experienced here in attempting to reduce the number of pending cases can only be exacerbated by this court's overseeing complex litigation in which there is no local interest, which concerns property and parties located elsewhere, and which requires witnesses and documentation that are accessible primarily in a jurisdiction over which this court has no power. Further, should St. Thomas jurors find it necessary to view the site, to do so could prove unduly expensive to the court and unfairly burdensome given existing time constraints for the conduct of the business of the court. For example, there is no

guarantee that possible qualified U.S. jurors will be qualified to enter the B.V.I. or that qualification to enter the B.V.I. could be made a condition of juror service.

Finally, plaintiffs urge that this case should not be dismissed because of the substantial work already done on it and the extensive involvement of the district court in St. Thomas. It is true that the presumption against dismissal based on *forum non conveniens* is greatly increased where the parties and courts have already expended a great deal of time and effort and discovery is well under way. *Lony II*, 935 F.2d 604 (3d Cir. 1991). However, in this case the discovery that has already occurred has been limited to the issue of *forum non conveniens*. It is the plaintiffs themselves who have sought to expand the scope of discovery, in an effort to find a "smoking gun" for their case and to draw this court deep enough into the merits of the dispute so that the weight of the circumstances might conceivably tilt against dismissal. However, even at this stage in the litigation, discovery has not gone too far into the merits to disallow dismissal of this action. Therefore, because the court believes that the island of Tortola is the most appropriate and convenient forum for the trial of this case, it hereby dismisses this action.

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

NANNY CAY ENTERPRISES, LTD., et al., Plaintiffs, v. BARCLAYS BANK PLC, Defendants.	CIV. NO. 100/1990

ORDER

AND NOW, this 28th day of April, 1994, it is hereby ORDERED the defendant's Motion to Dismiss on grounds of *forum non conveniens* is GRANTED.

BY THE COURT:

/s/ James T. Giles
J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-7308

NANNY CAY ENTERPRISES LTD.,
(previously C.D. Hunter Associates); CARIBBEAN
MARINE CENTER, LTD.,
and their subsidiary Nanny Cay, Ltd.;
B.V.I. PROPERTY MANAGEMENT;
NORBERT LORCK-SCHIERNING;
KLAUS WAECHTER;
D & C DEVELOPMENT, INC.

v.

BARCLAYS BANK PLC

Nanny Cay Enterprises, Ltd.
(previously C.D. Hunter Associates);
Caribbean Marine Center, Ltd. and
their subsidiary Nanny Cay, Ltd;
B.V.I. Property Management; Norbert
Lorck-Schierning; Klaus Waechter,
Appellants

(D.C. Civ. No. 90-cv-00100)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and SAROKIN, *Circuit Judges*.

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges

who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ Illegible
Circuit Judge

Dated: JAN 09 1995

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

NANNY CAY ENTERPRISES, LTD., (PREVIOUSLY C.D. HUNTER ASSOCIATES); CARIBBEAN MARINE CENTER, LTD., and their subsidiary NANNY CAY LTD.; B.V.I. PROPERTY MANAGEMENT, NORBERT LORCK-SCHIERNING, KLAUS WAECHTER, D & C DEVELOPMENT, INC.	)	CIVIL ACTION 90-100
Plaintiff	)	
v.	)	
BARCLAYS BANK PLC	)	
Defendant	)	

ORDER

AND NOW, this 2nd day of March, 1992, upon consideration of the oral motion of plaintiff D & C Development, Inc. ("D & C") to sever its claim against defendant Barclays Bank PLC, and the response of defendant thereto, and after oral argument on this matter on February 28, 1992, it is hereby ORDERED that:

1. For the reasons stated of record, D & C's motion is GRANTED;

2. D & C shall have fourteen (14) calendar days from the date of entry of this order to file a separate

complaint against defendant. The allegations of such separately filed complaint shall automatically relate back to the date of filing of Civil Action No. 1990/100, but only as to claims asserted in this captioned matter. Any new claim must be reviewed pursuant to Fed.R.Civ.P. 15 for a determination of its relation back entitlement.

3. Service shall be accepted by defendant's counsel.

4. Defendant shall have thirty (30) days from the date of service to answer or otherwise move.

BY THE COURT:

/s/ James T. Giles, J.
U.S. District Judge
(Sitting by Designation)

PLAINTIFF'S EXHIBIT B

IN THE BANKRUPTCY COURT OF THE
VIRGIN ISLANDS DIVISION OF
ST. THOMAS AND ST. JOHN

IN RE: D & C DEVELOPMENT, INC., Debtor,	CASE NO. 391-00023 CHAPTER 11
D & C DEVELOPMENT, INC., by its Trustee in bankruptcy, MORTON P. LEVINE, Plaintiff, v. BARCLAYS BANK, PLC, Defendant,	ADVERSARY NO. 392-0010
BARCLAYS BANK, PLC, Third-Party Plaintiff, v. KLAUS WAECHTER, ROSEMARIE WAECHTER, and RHYS HODGE, Third-Party Defendants.	

ROSEMARIE AND KLAUS WAECHTER'S RESPONSE TO BARCLAYS' THIRD-PARTY COMPLAINT

COME NOW Third-Party Defendants, Rosemarie and Klaus Waechter, and hereby respond to barclays Bank, PLC's Third-Party Complaint:

1. Admit.

2. Admit.

3. Admit.

4. Admit.

5. Deny as worded. Admit Waechter has been president and director of D & C Development, Inc.

6. Deny as worded.

7. Admit.

8. Admit.

9. Deny as worded. Waechter paid the debts in question pursuant to Barclays' express instructions.

10. Admit.

11. Deny as worded.

12. Deny as worded.

13. Deny for lack of knowledge.

14. Deny.

15. Deny.

16. Deny.

17. Deny.

18. Deny.

19. Deny.

20. (a) Deny for lack of knowledge.

(b) Deny for lack of knowledge.

(c) Deny for lack of knowledge.

(d) Deny for lack of knowledge.

(e) Deny for lack of knowledge.

COUNTERCLAIM AGAINST LEVINE

21. Deny.

22. Deny.

THIRD-PARTY CLAIM COUNT I: CONTRIBUTION AND INDEMNITY

24. As alleged.

22. Deny.

COUNT II: FRAUDULENT MISREPRESENTATION

23. As alleged.

24. Deny.

25. Deny.

COUNT III: NEGLIGENT MISREPRESENTATION

26. As alleged.

27. Deny.

28. Deny.

COUNT IV: BREACH OF WARRANTY

29. As alleged.

30. Deny.

AFFIRMATIVE DEFENSES

1. The Third-Party Complaint fails to state a claim upon which relief may be granted against Waechter.

2. The Third-Party Plaintiff has failed to comply with F.R.Civ.P. 19.

3. The Third-Party Plaintiff's claims are barred by applicable statutes of limitation.

4. Any damages the Third-Party Plaintiff may have suffered, which Barclays denies, were the result of actions or omissions by third parties over whom Waechter had no dominion or control.

5. Any damages the Third-Party Plaintiff may have suffered were the result of its own negligence which constitutes an absolute bar to recovery or, in the alternative, a partial bar to recovery pursuant to the provisions of 5 V.I.C. *et seq.*

6. The Third-Party Plaintiff's claims are barred by the doctrines of laches, ratification, waiver and estoppel.

7. The Third-Party Plaintiff is precluded from recovering against Waechter due to its unclean hands.

8. Any damages the Third-Party Plaintiff might have suffered were due to the fraudulent acts of its own agents acting within the scope of their authority.

9. The Third-Party Plaintiff has failed to plead its claims as required by F.R. Civ. P. 9(b).

10. The Third-Party Plaintiff's actions are barred by the doctrines of merger and bar, also referred to as res judicata dna [sic] collateral estoppel.

11. The Third-Party Plaintiff lacks standing or authority to bring this action.

12. Any claim the Third-Party Plaintiff may have is subject to and exceeded by Waechter's set-offs and counterclaims.

THIRD-PARTY COUNTERCLAIM

COME NOW Klaus and Rosemarie Waechter, by counsel, and hereby allege as the basis of their Counterclaim against Barclays Bank, PLC as follows:

1. This Court has jurisdiction as set forth in the Complaint and Counterclaim in this action.

2. Klaus and Rosemarie Waechter (hereinafter referred to as the "Waechters") entered into an agreement with Barclays Bank wherein Barclays Bank agreed that it would transfer certain funds so long as those funds were pledged for additional collateral and to repay certain loans of the Nanny Cay project being developed in Tortola of which the Waechters were principals.

3. As part of the agreement by and between the parties, it was agreed that if the Waechters permitted the funds to be so used, the Nanny Cay project would be reestablished so that the project could be completed and that the present loan for Nanny Cay issued by Barclays Bank would be restructured so that the project could be completed.

4. The Waechters performed their portion of this agreement by allowing the funds in question to be so used.

5. Barclays Bank breached their agreement by failing to allow the loans to be restructured as promised and thereafter calling a default on the loans after receiving the funds in question after giving the exchange for consideration of revising and extending the loans.

6. As such, Barclays Bank breached its contract, both express and implied, with the Waechters regarding this transaction.

7. Additionally, the bank breached its fiduciary duties to the Waechters by improperly seizing certain CDs pledged by the Waechters to the bank, securing certain notes contrary to the terms and conditions of the pledge and without waiting for the loan collateral to be applied against the loan to determine whether or not there was any deficiency which would warrant seizing the personal assets of the Waechters in the possession of the Bank.

COUNT I

8. Paragraphs one through seven are realleged and incorporated herein by reference.

9. There was a contract between the parties regarding the loan in Tortola as set forth above.

10. The contract was breached by the Bank.

11. As such, the Plaintiffs are entitled to compensatory, consequential and related losses as determined by the trier of fact for said breach of contract.

COUNT II

12. Paragraphs one through eleven are realleged and incorporated herein by reference.

13. The Bank owed a fiduciary duty to the Counterclaim Plaintiffs to act in good faith and to honor the agreement by and between the parties.

14. The Bank breached this agreement both in failing to renew the loan in Tortola by re-establishing it as agreed upon by and between the parties as well as by seizing certain CDs in the name of the Counterclaim Plaintiffs contrary to the agreement by and between the parties.

15. As a direct and proximate result of said breach of fiduciary duty, the Waechters have suffered substantial damages for which the Defendant Barclays Bank is liable including compensatory, consequential and punitive damages as well as any and all other relief this Court deems appropriate.

WHEREFORE, the Waechters seek relief against Barclays for compensatory damages, consequential damages, punitive damages and any and all other relief this Court deems appropriate.

A TRIAL BY JURY IS DEMANDED AS TO ALL ISSUES.

DATED: December 13, 1993

/s/ Joel H. Holt
JOEL H. HOLT
2132 Company Street, Suite 2
Christiansted, St. Croix
U.S. Virgin Islands 00820
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NO. 94-1584

SUPREME COURT U.S.
FILED
APR 13 1995
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

NANNY CAY ENTERPRISES, LTD.,
(PREVIOUSLY C.D. HUNTER ASSOICAITES),
CARIBBEAN MARINE CENTER, LTD. and their
subsidiary NANNY CAY, LTD.,
B.V.I. PROPERTY MANAGEMENT, NORBERT
LORCK-SCHIERNING and KLAUS WAECHTER,
Petitioners,

v.

BARCLAYS BANK PLC,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

BRIEF IN OPPOSITION

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Attorneys for Respondent
Barclays Bank PLC

April, 1995

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly concluded that the District Court did not abuse its discretion in dismissing this action on grounds of *forum non conveniens*.

2. Whether *certiorari* should be granted to review whether the District Court's factual findings constituted an abuse of discretion, where there is no split of authority among the circuits, and the principles governing dismissals on grounds of *forum non conveniens* are set forth in an unbroken line of decisions of this Court.

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STATEMENT OF THE CASE

The Petition for Certiorari filed herein greatly oversimplifies the posture and misstates the facts of this controversy, which involves, not only the instant action (referred to herein as the "Nanny Cay action"), but also three related actions filed in the District Court of the Virgin Islands (referred to below as the "D&C lender liability action," the "D&C foreclosure action, and the "D&C third party action") and a Chapter 11 petition filed in the Bankruptcy Court for the District of the Virgin Islands.

The instant "Nanny Cay" action involves the construction and financing of the Nanny Cay marina and condominium project in Tortola, British Virgin Islands ("B.V.I."). The corporate plaintiffs, Nanny Cay Enterprises, Ltd., Caribbean Marine Center, Ltd. ("CMC"), Nanny Cay, Ltd., and B.V.I. Property Management, Ltd. (referred to herein collectively and interchangeably as "Nanny Cay") are all foreign corporations organized and doing business solely in the British Virgin Islands ("B.V.I."). The individual plaintiffs, Norbert Lorck-Schierning ("Schierning") and Klaus Waechter ("Waechter"), are residents of Germany.[1]

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[1] Although Waechter claims to divide his time between St. Thomas and his native Germany, he has previously denied in a related District Court proceeding that he is a resident of St. Thomas, (App. 296, 301), filed U.S. tax returns as a non-resident alien, and refused to appear for deposition in a related U.S. Virgin Islands proceeding unless his roundtrip airfare was paid from Frankfurt, Germany. (All Appendix cites are to the Joint Appendix filed with the Third Circuit by the parties herein).

On October 15, 1986, Barclays Bank PLC ("Barclays")[2] agreed to lend CMC $2.25 million, and to extend overdraft privileges of $150,000.00, for construction of a 40 room condominium hotel, marina, and associated facilities, on Tortola, B.V.I. The $2.25 million loan was payable over five years, but the overdraft facility was payable upon demand. (App. 161, 163) CMC's directors, including plaintiff Waechter, executed individual guarantees for the full amount of the $2.4 million debt. (App. 97, 161-2) This loan was closed and administered by Barclays' Tortola branch without any involvement by Barclays' St. Thomas branch.

Pursuant to the terms of the loan, construction draws were released, and checks creating an overdraft were honored, on Tortola by Barclays pursuant to the instructions of CMC's agents and employees. Those principally responsible for authorizing the overdrafts and draws on behalf of CMC were Chuck Hunter, the then-managing director of CMC, Alan Smith, CMC's former architect, and Brian Jackson, CMC's former accountant. (App. 291). All of these key witnesses are residents of Tortola. During this period, the "major players in the development," namely Mr. Waechter and Mr. Hunter, had been visiting the site regularly during this period and should have been aware that substantial cost overruns were accumulating. (App. 392).

By the latter part of 1987, it became apparent that this had become a problem loan, that the Tortola project was suffering construction cost overruns in excess of one million

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[2]Pursuant to Rule 29.1 of this Court, Barclays Bank PLC states that it is a subsidiary of Barclays PLC, a publicly traded corporation organized under the laws of England and Wales. It has no other parent or subsidiary corporations except for wholly owned subsidiaries.

dollars, and that an overdraft well in excess of the allowable amount had accumulated. These overdrafts had been used, not just to finance construction but to finance repairs performed by petitioner Klaus Waechter on his luxury yacht and to repay insider loans to petitioner Schierning. (App. 391, 392). Shortly before the Nanny Cay problem came to light, Barclays underwent a reorganization putting its Tortola office, which previously had reported directly to the New York office, under a regional office located in St. Thomas. Nevertheless, virtually all contacts with the management of the Nanny Cay project, and most notably with director Klaus Waechter, continued to be funneled through Tortola branch manager Brian Sollitt, (App. 369-372, 386, 402-03, 426).

Barclays was prepared to make the additional advances required to complete construction (App. 392), provided the guarantors, including Waechter, either put more equity into the project or posted additional security. Waechter informed Sollitt that he had invested a substantial sum in the U.S. Virgin Islands corporation D&C Development, Inc. ("D&C"), which owned real property on St. Thomas. Waechter proposed to use his stake in D&C, under a variety of schemes, to provide the required additional security for the Nanny Cay project.

Barclays rejected Waechter's first proposal, which was that Barclays accept assignment of a note secured by a second mortgage on the D & C property. This note was payable to a Channel Islands company in which he claimed to have some controlling stake. (App. 371). Next, Waechter proposed that D & C guarantee a portion of the Nanny Cay debt. (App. 389). However, Barclays concluded after investigation that such a inter-corporate guarantee would be unenforceable. (App. 372).

Finally, Waechter proposed that Barclays replace the Bank of Nova Scotia as D&C's primary lender and refinance the existing debts of D & C, including some $832,000.00 in loans made by Waechter and his wife personally to D & C. (App. 372, 396). This proposal was accepted by the bank. On April 20, 1988, the D & C loan was closed in St. Thomas, without any involvement by Tortola personnel, pursuant to D & C board resolutions presented by the Waechters and D & C counsel Rhys Hodge. The loans by the Bank of Nova Scotia and the Waechters were paid from the proceeds. Pursuant to his agreement, Waechter transmitted $650,000.00 to Barclays' Tortola branch to further secure his guaranty of the Nanny Cay indebtedness. In exchange for this posting of additional security, Barclays provided an additional credit facility of $1.2 million to CMC.

The Nanny Cay restaurant, office buildings, marina, and condominium units were completed over the next several months. (App. 402-03, 413-414). However, the Nanny Cay group continued to fail to meet its obligations under the loan agreements with Barclays. Barclays ultimately instituted receivership proceedings in Tortola pursuant to the laws of the B.V.I. See App. 717-25.

Similarly, on St. Thomas, D & C never made a single payment on its 1988 loan from Barclays. On February 12, 1990, Barclays filed the "D&C foreclosure action" in the District Court of the Virgin Islands seeking foreclosure of its lien against the D&C's St. Thomas real property. (App. 295-300) Waechter and D & C answered but asserted no counterclaims. Instead, on April 23, 1990, D & C and the appellants herein separately filed the instant "Nanny Cay" action. Although filed in St. Thomas, this

complaint (App. 837) appears to allege wrongdoing based solely on the alleged mishandling of the Nanny Cay loan by Barclays' Tortola branch, and to allege harm based solely on the Nanny Cay cost overruns. D&C was included as a nominal plaintiff, according to the deposition of Attorney Rhys Hodge, who drafted the complaint, simply out of an abundance of caution, since the two-year statute of limitations was about to run on any claims D&C might have against Barclays. (App. 179).

Because of the inconvenience involved in litigating in St. Thomas over events occurring exclusively in Tortola, Barclays moved to dismiss the instant action on *forum non conveniens* grounds on August 20, 1990, shortly after being served with the complaint. The Court then ordered this motion to be heard on March 25, 1991.

Three days before the scheduled hearing, plaintiffs moved to substitute Joel Holt, Esq., as their counsel. At the hearing, plaintiffs' new counsel requested and was granted additional time to conduct discovery on the *forum non conveniens* issues. During the following eleven months, plaintiffs noticed and conducted a single deposition, and served two separate requests for document production, to which Barclays responded with four separate productions, totalling over fifteen hundred pages (App. 850-57).

Barclays propounded a single request for document production, (App. 846-49) followed by a motion to compel a response to same (App. 835). Plaintiffs responded to neither filing, stating that all relevant documents were in the possession of the receiver controlled by the B.V.I. Court in Tortola (App. 614, 653).

Although unwilling to respond to discovery in St. Thomas, Petitioners herein were quite active in the courts of

the B.V.I. They filed two separate actions against Barclays in Tortola's High Court of Justice, both of which alleged that Barclays breached a duty of care owed to plaintiffs in its management of the Nanny Cay/CMC loan. The action seeking a damage award, and making "lender liability" allegations (App. 698, ¶5), was dismissed voluntarily once Barclays cited its pendency as a reason for dismissal of the instant action. The other, seeking to displace the receiver appointed to manage the insolvent Nanny Cay project, eventually proceeded to trial before Tortola's High Court of Justice, which entered judgment in favor of Barclays on all issues. (App. 473-87, 717-25).

In the instant action, Barclays' motion to dismiss on *forum non conveniens* grounds came on for hearing on February 28, 1992. Significantly, however, by the date of the hearing, Waechter and his new counsel were no longer at the helm of the sole St. Thomas plaintiff, D & C, whose interests had diverged from those of the remaining plaintiffs, who are Petitioners herein.

Waechter set in motion the events that led to his loss of control over D & C shortly after he consented, on behalf of himself and D & C, to entry of judgment in the "D&C foreclosure action" in a form order reviewed and initialed on each page by counsel for Waechter and D & C. On the very day before the scheduled foreclosure sale of the D & C property pursuant to this agreed judgment, D & C filed a Chapter 11 petition in bankruptcy, staying the sale. In response to motions alleging, among other things, mismanagement or misconduct on the part of Waechter and his wife (the "Waechters"), who constituted two of the three members of the D & C board that authorized the 1988 refinancing, the Bankruptcy Court conducted a hearing and

appointed a trustee to manage the D & C estate. The trustee subsequently retained a new attorney to pursue D&C's claims that Waechter had defrauded the corporation, its creditors, and minority shareholders, among other things, by inducing Barclays to make the February, 1988 loan to D&C Development.

At the hearing held in this action on February 28, 1992, in light of this divergence of interests between the foreign plaintiffs and the sole St. Thomas plaintiff, the trustee's attorney moved for severance of D&C's claims, and the motion was granted without opposition. (App. 630, 633). The Court then turned to Barclays' long-pending motion to dismiss the remaining claims on *forum non conveniens* grounds. After extensive colloquy with counsel, the court made findings on the record, and ordered that except for the severed claims, the action would be dismissed for *forum non conveniens*. Plaintiffs appealed this decision. In an opinion dated March 24, 1993, the Third Circuit reversed and remanded to the District Court for more extensive and explicit findings on a number of factors enumerated in its opinion. After remand, Barclays filed a renewed motion to dismiss, addressing through affidavits and other materials the factors identified by the appellate court. This motion was fully briefed and came on for hearing on April 13, 1994 before Judge James T. Giles.

On the very day of the hearing, four years after their complaint was filed, plaintiffs submitted an amended complaint altering dramatically their theory of recovery. The gravamen of the initial complaint was that Barclays "breached its duty of due care and its fiduciary duty to the Plaintiff by improperly releasing and or allowing an overdraft in excess of One Million Dollars ($1,000,000.00)

... " (App. 838). The amended complaint purported to eliminate the question of the unauthorized overdraft by alleging, for the very first time in this litigation, that Waechter and Barclays entered into an oral agreement to restructure the Nanny Cay loans. Under this newly-pleaded oral agreement, Waechter, apparently acting on behalf of both the plaintiff corporations and the individual guarantors of their debts, allegedly ratified the overdraft and agreed not to "challenge the amount of the debt to the bank," including the disputed overdraft balance. (App. 574).

In his colloquy with the Court at the April 13, 1994, hearing, plaintiffs' counsel freely admitted that the purpose of the amendment was to make any evidence regarding the overdraft irrelevant. (App. 79, 96). The Court found that, even taking plaintiffs' new claims at face value, the testimony of the Tortola witnesses regarding the overdrafts would be a critical part of any trial of this action. On April 28, 1994, the District Court entered a Memorandum Opinion and Order making the findings requested by the Third Circuit and dismissing plaintiffs' claims on grounds of *forum non conveniens*. The Third Circuit affirmed this decision without opinion and denied rehearing *en banc*.

Petitioners herein also make reference to the separate "D&C lender liability" action consisting of the severed St. Thomas claims brought by D&C Development's trustee, and claim that "Barclays had filed its own suit in the U.S. Virgin Islands against Mr. and Mrs. Waechter," and that "extensive discovery" has taken place in that suit. Petition at 5. Both

claims are misstatements of the record.[3] Barclays did not come voluntarily as a plaintiff to assert claims against the Waechters in that proceeding. Instead, it was haled into this court as a defendant in the "D&C lender liability" action, which was filed by D&C's trustee in March of 1992, after the District Court severed its claims from the instant action for separate prosecution. In that case, the trustee accused Barclays of aiding and abetting the efforts of Waechter to loot the corporate assets and thereby defraud the minority shareholders and creditors of that defunct corporation. The trustee claimed that Barclays refinanced the corporate debts, including certain insider loans made by the Waechters to the corporation, based on corporate resolutions that were improperly obtained by the Waechters pursuant to a board of directors meeting that never occurred.

For obvious strategic reasons, the trustee did not join as defendants those whose fraud Barclays allegedly aided and abetted, namely the Waechters. So that the fault of all parties alleged to be culpable could be adjudicated in one proceeding, Barclays was forced to join as third party defendants in the "D&C lender liability" action both the Waechters and Attorney Rhys Hodge, D&C Development's attorney who opined that the loan was properly authorized and who claimed that he was present at the board meeting which allegedly never occurred. Barclays sought no affirmative relief, but only contribution or indemnification for any judgment which it might be required to pay. The

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[3]Petitioners also claim that the District Court "did not even discuss" the D&C Development lawsuit. As evidenced by the very opinion appended to their Petition, though, the District Court in fact explicitly discussed this action and found it to involve issues "legally distinct from plaintiffs' Nanny Cay theory against Barclays." Petition, p. 26a, n.1.

District Court referred the action to Bankruptcy Court for treatment as an adversary proceeding.

The discovery conducted in the "D&C lender liability" case did not involve either the Nanny Cay-related overdraft issues raised in Petitioners' original complaint or the oral restructuring agreement issues raised in their amended complaint. Discovery in the "D&C lender liability" suit instead involved allegations that the Waechters engaged in a pattern of looting D&C's corporate assets and defrauding its minority shareholders going back to 1981.

As part of their continuing effort to bring their Tortola-based claims before a U.S. Virgin Islands jury, the Waechters refiled the instant "Nanny Cay" claims as third-party counterclaims in the "D&C lender liability" action. The trustee and Barclays subsequently settled their claims, and the remaining claims were transferred from Bankruptcy Court back to the regular civil docket of the District Court and filed as the separate "D&C third party" action. Barclays was redesignated, somewhat misleadingly, as plaintiff by virtue of its claims for contribution and indemnity. Discovery in that matter has been stayed pending the disposition of the instant "Nanny Cay" action. Barclays has moved to dismiss both the Waechters' counterclaims, which mirror the Nanny Cay-based claims asserted herein, on *forum non conveniens* grounds, and its own contribution and indemnity claims, all without prejudice to refiling in another forum. This motion is fully briefed and ready for decision by the District Court.

REASONS FOR DENYING THE WRIT

I. THE APPELLATE COURT, IN AFFIRMING WITHOUT OPINION, PROPERLY RULED THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THIS ACTION.

The controlling precedent in the Third Circuit[4], which turn derives from a trilogy of cases from this Court,[5] requires courts to look at three groups of factors. As a threshold matter, the court must first determine that an adequate alternative forum exists to hear plaintiff's claims.[6] Next, the Court must weigh and balance a variety of private interest factors.[7] Third, the Court must examine a variety of public interest factors,[8] including the "administrative and legal problems" alluded to in Koster.[9]

In weighing these various factors, there is no rigid rule governing the court's determination.[10] This Court has

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[4]Lacey v. Cessna Aircraft Co., 862 F.2d 38 (3d Cir. 1988) (hereinafter "Lacey I"); Lony v. E.I. DuPont de Nemours & Co., 886 F.2d 618 (3d Cir. 1989) ("Lony I"); Lacey v. Cessna Aircraft Co., 932 F.2d 170 (3d Cir. 1991) ("Lacey II"), and Lony v. E.I. DuPont de Nemours & Co., 935 F.2d 604 (3d Cir. 1991) ("Lony II").

[5]Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Koster v. Lumbermans Mutual Casualty Co., 330 U.S. 518 (1947); and Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

[6]Lacey II, 932 F.2d at 180; Piper, 454 U.S. at 254 n. 22.

[7]Piper, 454 U.S. at 257.

[8]Id., 454 U.S. at 257.

[9]Id., 330 U.S. at 524.

[10]Lacey I, 862 F.2d at 43.

repeatedly emphasized the necessity to retain flexibility and to avoid the application of rigid rules.[11] The "ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice."[12] The law is clear that, in reviewing the district court's decision, the appellate court does not perform a *de novo* review of the relevant factors, and may not substitute its judgment for that of the District Court.[13] Its review is limited to consideration of whether the district court abused its discretion. So long as all relevant factors are considered and the Court does not abuse its discretion in making findings, the court's decision must be affirmed on appeal.

In this action, because the district court properly evaluated all factors in this clear cut case, its decision was affirmed summarily. Petitioners do not take issue with the correctness of this three-part legal analysis applied, nor could they since these factors derive from an unbroken line of authority stretching back at least to the 1947 decision in Koster, supra. They do not take issue with the specific factual findings made by the District on each of these three factors, namely, alternate forum, private interest factors, and public interest factors.

Instead, Petitioners first advance a *non sequitur*. Without explaining how their objection fits into this orderly framework for analysis, Petitioners argue that because Barclays, as defendant in the separate "D&C lender liability" action, joined as third party defendants those whose fraud it

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[11]Piper, 454 U.S. at 249-50.

[12]Koster, 330 U.S. at 527.

[13]Piper, supra, 454 U.S. at 237.

allegedly abetted, this somehow shows that the decision of the District Court was an abuse of discretion.[14] The relevance of the "D&C lender liability" and "D&C third party" actions was considered and dismissed by the District Court in an extensive written opinion that the Third Circuit correctly found to constitute a proper exercise of discretion.

Second, Petitioners claim that District Court's careful analysis must be rejected, and the dismissal reversed, because the District Court failed to specify with sufficient particularity the precise level of deference it paid to the forum choice of these foreign plaintiffs. Noticeably absent is any discussion of the fact that all Petitioners, both individual and corporate, are foreign citizens. The law is clear that the forum choice of foreign plaintiffs is entitled to less deference than that of residents who sue in their home forum.[15]

In its first decision dismissing this action, the District Court attributed "great weight" to their choice of forum, but found in light of the many factors favoring dismissal, that their choice was "not controlling." (App. 77-78). This was a greater level of deference than required under controlling precedent. The Third Circuit, in its initial decision remanding this action, requested greater analysis of the claim that a St. Thomas forum would serve the plaintiffs' convenience since "Waechter resides there and because crucial documents and witnesses are located there."[16] The District Court, in an extensive written opinion, analyzed

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[14]Petition at 5-6.

[15]Piper, supra, 454 U.S. at 255-257.

[16]Petition at 13a.

these assertions and found them to be meritless. The Third Circuit correctly found this determination to fall within the Court's broad discretion.

Indeed, Petitioners' objections on this point are controlled by Piper, supra, 454 U.S. at 255-56, where the Third Circuit reversed the grant of a *forum non conveniens* motion, finding that insufficient deference was paid to the forum choice of foreign plaintiffs. This Court in turn reversed the appellate court, holding that the District Court applied the proper legal standard in dismissing the foreign plaintiffs' claims, and did not abuse its discretion.

II. PARTICULARLY SINCE THERE IS NO SPLIT OF AUTHORITY AMONG THE CIRCUITS, AND THE PRINCIPLES GOVERNING DISMISSALS ON GROUNDS OF FORUM NON CONVENIENS ARE SET FORTH IN AN UNBROKEN LINE OF DECISIONS OF THIS COURT, CERTIORARI SHOULD NOT BE GRANTED SIMPLY TO REVIEW WHETHER THE DISTRICT COURT'S FACTUAL FINDINGS CONSTITUTED AN ABUSE OF DISCRETION IN THIS PARTICULAR CASE.

It is difficult to glean from their submission precisely why Petitioners believe that this Court should exercise its *certiorari* jurisdiction to review the factual findings of the District Court for abuse of discretion, particularly since the Third Circuit affirmed without opinion. Petitioners do not claim that their petition falls within any of the reasons for exercise of this Court's *certiorari* jurisdiction set forth in Rule 10 of this Court.

Certainly, there is no claim, pursuant to Rule 10.1(a), of conflict among the various United States courts of appeal or the state courts of last resort as to the proper standards to be applied. Neither is there a claim, pursuant to Rule 10.1(c), that in affirming the District Court without opinion the Third Circuit decided an important question of federal law that has not been settled by this Court. Similarly, petitioners do not appear to argue that the appellate court "sanctioned such a departure" from the "accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's power of judicial supervision," pursuant to Rule 10.1(a).

This Petition, if it claims to fall within any of the accepted categories, must be interpreted to fit within Rule 10.1(c), namely, to allege that the appellate court "has decided an important question of federal law which has not been, but should be decided by this Court." Apparently this is what Petitioners mean to say when they urge this Court to

> grant *certiorari* to clarify the *forum non conveniens* doctrine in light of the expanding field of international law related to business transactions that initiate in the United States but result in activities occurring outside of its borders.[17]

Petitioners advance nothing to show that there is a need for further clarification of the three-part analysis enunciated by this Court in a line of opinions culminating in Piper, supra, 454 U.S. at 255-61. In its essence, petitioners'

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[17]Petition at 8.

chief complaint, repeated three times,[18] appears to be that, in engaging in its orderly analysis, the District Court did not recite the talismanic words, "vexatious, harassing, or inconvenient." This fails to constitute an adequate basis for reversal of the decision below, much less the exercise of *certiorari* jurisdiction.

III. CONCLUSION.

On the merits, the Third Circuit's affirmance, without opinion, of the District Court's carefully crafted, although unpublished, written decision, must itself be affirmed. More important, though, Petitioners have identified no issue worthy of consideration by this Court on writ of *certiorari*. This Court should decline to exercise jurisdiction over this matter.

Respectfully Submitted,

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[18]Petition at pp. i, 8, 9.

No. 94-1584

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In The

Supreme Court of the United States

October Term, 1994

NANNY CAY ENTERPRISES, LTD., (PREVIOUSLY C.D. HUNTER ASSOCIATES), CARIBBEAN MARINE CENTER, LTD. and their subsidiary NANNY CAY, LTD., B.V.I. PROPERTY MANAGEMENT, NORBERT LORCK-SCHIERNING and KLAUS WAECHTER,

Petitioners,

v.

BARCLAYS BANK PLC,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONERS' REPLY BRIEF

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April 24, 1995

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REPLY ARGUMENT

The statement of the case as presented by the respondent clearly demonstrates why this Court needs to intervene in this case. As noted in the statement of the case, protracted litigation is taking place in the U.S. District Court of the Virgin Islands regarding the loan transactions in question. This litigation has been fragmented by the District Court's determination that some of the litigation is convenient before the Court in St. Thomas while it would be more convenient for other aspects of the case to be *dismissed* in favor of a foreign jurisdiction. However, the Court never held that it was "inconvenient" for Barclays to litigate all of these issues in the Virgin Islands.

Quite significantly, Barclays' Brief in Opposition does not argue that it would be inconvenient to litigate these claims in the U.S. Virgin Islands. Moreover, contrary to Barclays' suggestion that the transactions in Tortola are separate from those in St. Thomas, it is clear that the only reason Barclays loaned additional funds in St. Thomas was to further secure the Tortola loan. Indeed, Barclays admits it has filed its own suit against the Waechters in the U.S. Virgin Islands regarding the same loan transaction, which is inextricably connected between the U.S. and British Virgin Islands. Barclays' admission that it is now trying to dismiss the suit it filed in St. Thomas confirms that Barclays is merely "forum shopping" and that St. Thomas is not really an inconvenient forum in which to litigate these issues.

Such piecemeal litigation in a complicated commercial transaction is a misuse of the doctrine of *forum non conveniens* as enunciated by this Court. In order to clarify

district courts in the future as to the application of the *forum non conveniens* doctrine, it is essential for this Court to intervene in this matter by granting certiorari under either rule 10.1(a) or 10.1(c) in clarifying how the doctrine is to be utilized in such transactions which take place in more than one jurisdiction. This question is even more important when the other jurisdiction is not one within the boundaries of the United States, as is the case here. Indeed, it is unlikely that the British Courts will even permit the case to be heard because of the passage of time that has occurred, rendering this preliminary procedural decision a dispositive one.

Respectfully submitted,

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